BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOSEPH C. ROTTINGHAUS Claimant	)	
V.	)	
CONWAY BANK Respondent	)	Docket No. 1,068,166
AND	)	
EMCASCO INSURANCE Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 20, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Brad E. Avery. Scott J. Mann of Hutchinson, Kansas, appeared for claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for respondent.

The ALJ found claimant sustained bilateral knee injuries as a result of his March 8, 2013, accident, and the accidental injuries arose out of and in the course of claimant's employment with respondent. The ALJ found claimant's work-related accident was the prevailing factor causing his injuries, medical condition, and impairment. The ALJ appointed Dr. Daniel Prohaska to provide medical treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 21, 2014, Preliminary Hearing; the transcript of the December 9, 2014, Preliminary Hearing and exhibits; the transcript of the February 19, 2015, Preliminary Hearing and exhibits; the transcript of the January 31, 2014, evidentiary deposition of claimant; and the transcript of the December 4, 2014, evidentiary deposition of Dr. Daniel J. Prohaska and exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the greater weight of the evidence establishes claimant's work-related accident was not the prevailing factor in causing injury to claimant's knees or the need for medical treatment.

Claimant contends the ALJ's Order should be affirmed. Claimant argues the evidence shows his work-related accident was the prevailing factor causing bilateral knee injuries and need for additional medical treatment.

The sole issue for the Board's review is: was claimant's March 8, 2013, work-related accident the prevailing factor causing claimant's bilateral knee injuries and need for medical treatment?

FINDINGS OF FACT

Claimant is the president of respondent, Conway Bank. At approximately 3:00 p.m. on Friday, March 8, 2013, claimant was driving respondent's 2013 Ford F-150 truck to the Wolf Creek Nuclear Generating Station on work-related business when he was injured in a motor vehicle accident. According to the Kansas Motor Vehicle Accident Report, claimant was traveling south on U.S. Route 75 when he was struck by an oncoming vehicle.[1] Claimant was transferred from the scene via helicopter to Stormont-Vail HealthCare hospital in Topeka, Kansas. Claimant testified he does not remember much prior to his arrival at the hospital.

Claimant sustained a laceration to his scalp, pain to the anterior chest wall and left upper abdomen, a nondisplaced transverse fracture to the left fibula and a comminuted fracture to the distal phalanx of the right great toe. Claimant underwent treatment for his injuries and was discharged from the hospital on March 11, 2013.

Claimant began treatment with orthopedic surgeon Dr. James Lairmore on March 14, 2013, for care of his left fibula fracture and right great toe fracture. Dr. Lairmore performed a physical examination of claimant and noted claimant had "no complaints of pain in the hips, knees, or ankles."[2] Dr. Lairmore restricted claimant to sedentary work and provided pain medication. Claimant continued to follow up with Dr. Lairmore, and on September 17, 2013, claimant was released to resume full work duties. Dr. Lairmore reported claimant had a normal gait, a normal foot examination, and a normal left knee examination. At the time he was released, claimant complained of medial lateral hindfoot pain. Due to the continued complaints, Dr. Lairmore determined claimant's case would remain open for an additional three months before the assessment of a final rating.

Dr. C. Reiff Brown examined claimant on November 5, 2013, at claimant's counsel's request. Claimant complained of swelling of both feet and lower legs during the course of a workday, difficulty with the right knee while using stairs and prolonged walking, and pain

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[1] See P.H. Trans. (Dec. 9, 2014), Cl. Ex. 2 at 1.

[2] P.H. Trans. (Dec. 9, 2014), Resp. Ex. D at 1.

and discomfort in the left elbow. Dr. Brown reviewed claimant's available medical records, history, and performed a physical examination. Dr. Brown determined:

> In my opinion, [claimant] has suffered significant trauma to both lower extremities in the head on collision on March 8, 2013 . . . . I believe he also suffered injury to his right knee, internal derangement is likely given the severity of the collision and left elbow, likely soft tissue damage. My opinions regarding the right knee and left elbow are based in part on the severity of the collision which fracture[d] parts of both lower extremities, and the fact that he is still symptomatic in these areas over nine (9) months after the accident.
>
> The accident is the prevailing factor causing his injuries, his medical conditions and the need for medical treatment as outlined herein.[3]

Dr. Brown recommended claimant see an orthopedic specialist for the right knee and left elbow symptoms with additional diagnostic studies for further diagnosis. Dr. Brown opined claimant could perform his usual work activity if limited to sedentary work.

Claimant returned to Dr. Lairmore on December 3, 2013, at which time he was found to be at maximum medical improvement (MMI) with no disability. Dr. Lairmore wrote, "With the exception of some achiness which [claimant] has in his legs bilaterally he has no impediment or disability no loss of sensation and no change in his pain from his injury condition."[4] During the course of treatment, Dr. Lairmore never recorded complaints of pain related to claimant's knees, lower extremities, or left elbow. Claimant stated he told Dr. Lairmore about his knee problems, including swelling, numbness, and tingling sensations, but did not receive treatment. Claimant testified:

> Q. All right. You had about – looks like six different visits with Dr. Lairmore. Did you continue to make complaints about your lower extremities to him?
>
> A. Yes.
>
> Q. Did he at any time provide you treatment for those complaints?
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> A. No.
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> . . .
>
> Q. In general, what did Dr. Lairmore or his P.A. tell you regarding your complaints to your legs?

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[3] P.H. Trans. (Dec. 9, 2014), Resp. Ex. C at 2-3.

[4] P.H. Trans. (Dec. 9, 2014), Resp. Ex. D at 14.

. . .

A. Basically I was just told to give it time. It would get better over time.[5]

Claimant stated he continued asking Dr. Lairmore what he needed to do regarding these complaints. Claimant testified:

> I understood [Dr. Lairmore's] primary focus was always the foot and the toe and the leg. But, yes, I needed – I was asking the question whether I needed to go to someone else about those other issues.[6]

Dr. Dana Richman, claimant's primary care physician, examined claimant on December 3, 2013, for complaints of neuropathy in the legs, bilateral leg pain with the left worse than the right, and problems with the left elbow. Claimant also complained of stiffness in both knees upon rising. Dr. Richman performed a physical examination and assessed neuropathy of the legs, leg pain, and tendinitis of the left elbow. Dr. Richman ordered an EMG of claimant's bilateral lower extremities, and it was read to reveal peripheral polyneuropathy.

Dr. Chris Fevurly examined claimant on February 17, 2014, at respondent's request. Claimant complained of daily numbness and tingling in the feet, aggravated by walking and standing, and sensitivity in the right great toe. Dr. Fevurly noted, "There was no mention of either right knee pain or left elbow pain during the interview today but he mentions the right knee pain on his questionnaire today."[7] After reviewing claimant's history, medical records, and performing a physical examination, Dr. Fevurly diagnosed claimant with bilateral sensorimotor lower extremity peripheral neuropathy, left lateral epicondylitis, and probable mild right knee patellofemoral (chondromalacia) pain. He found no physical examination evidence for a meniscal tear or ACL rupture of the right knee. Dr. Fevurly determined claimant's bilateral peripheral neuropathy has no probable causal relationship to the accident of March 8, 2013. Dr. Fevurly further opined:

> There is development of left lateral epicondylitis (tennis elbow) but this complaint was not reported by any of the treating medical providers . . . . The tennis elbow is likely related to his activities in the office as opposed to injury from the [motor vehicle accident.]
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> The right knee pain is also not reported by any of the treating medical providers and is only mentioned today in his questionnaire and not during the interview. It is

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[5] P.H. Trans. (Dec. 9, 2014) at 9-10.

[6] Claimant's Depo. at 28.

[7] P.H. Trans. (Dec. 9, 2014), Resp. Ex. B at 4.

> probably that this is a manifestation of patellofemoral chondromalacia which also has no causal relationship to injury from the [motor vehicle accident].[8]

Dr. Fevurly recommended no permanent restrictions and noted claimant reached MMI from his accident-related injuries on December 3, 2013. Using the AMA *Guides*,[9] Dr. Fevurly assessed a 5 percent impairment to the left lower extremity due to atrophy of the left calf by one centimeter.

Dr. John Estivo examined claimant on April 4, 2014, by order of the ALJ for purposes of an independent medical evaluation (IME). Claimant complained of numbness and tingling in both legs from the knees down, pain in the right great toe, and popping in both knees upon rising, the right worse than the left, which decreases with walking. Dr. Estivo reviewed claimant's medical records, history, and performed a physical examination. Dr. Estivo determined claimant's generalized numbness and tingling in both feet is related to preexisting underlying peripheral polyneuropathy and is not related to claimant's March 2013 accident. Regarding claimant's bilateral knees, Dr. Estivo found:

> The right and left knee symptoms would not be related to the incident of 03/08/2013. The prevailing factor regarding this patient's right and left knee symptoms would be his age related degenerative joint disease at the patellofemoral joints of both knees and not the incident of 03/08/2013.[10]

Dr. Estivo opined, using the AMA *Guides*, claimant has a 5 percent impairment to the left lower extremity for a 1 centimeter atrophy to the left calf. Dr. Estivo determined claimant did not require any permanent restrictions in relation to the March 2013 accident.

Dr. Daniel Prohaska, also appointed by the ALJ for IME purposes, examined claimant on September 11, 2014. Claimant's chief complaint was bilateral knee pain. Dr. Prohaska reviewed claimant's history, medical records, performed a physical examination, and determined claimant has right prepatellar bursitis, bilateral hypertrophy of fat pad, and bilateral chondromalacia of the patella. Dr. Prohaska recommended claimant undergo an MRI of the bilateral knees and consider diagnostic injections. Dr. Prohaska wrote:

> In regard to causation of whether or not this is related to by prevailing factor a work-related injury from his motor vehicle accident, I believe that a direct trauma to the anterior aspect of the knee leaving residual pain, regardless if there was mild pre-existing patellar chondromalacia, this is a significant traumatic event exacerbation

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[8] *Id.* at 8.

[9] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[10] P.H. Trans. (Dec. 9, 2014), Resp. Ex. A at 6.

> and does meet prevailing factor rules for the knees to be considered work related, including the prepatellar bursa inflammation of the right knee.[11]

Dr. Prohaska did not believe further conservative care would resolve claimant's issues due to the length of time since the accident.

Dr. Prohaska testified he did not read claimant's medical records until after the physical examination. Dr. Prohaska stated he used claimant's direct reporting of symptoms in reaching his opinions, and it seemed as if claimant had symptoms since the March 2013 accident. Dr. Prohaska agreed the medical records listed no complaints of bilateral knee pain for months following the accident. He opined that if claimant had ample opportunity to voice these complaints, "then it would be medically unlikely and it would not meet prevailing factor for the accident to be the cause of his knee pain."[12] However, Dr. Prohaska later testified his original prevailing factor opinion of September 11, 2014, remained unchanged.

Claimant underwent an MRI of both knees on December 18, 2014. Dr. Timothy Sanders, radiologist, interpreted the MRI to reveal an obliquely oriented tear of the medial meniscus on the left and an obliquely oriented tear of the posterior horn medial meniscus on the right. A small knee effusion was present bilaterally. Dr. Sanders found mild tricompartment arthritis most prominent in the medial compartment of the left knee. Regarding claimant's right knee, Dr. Sanders noted:

> There is a 1 cm high-grade chondral flap tear/defect noted along the superior margin of the trochlear groove. There is minimal low-grade chondromalacia patella and smooth low-grade chondral thinning within the medial compartment of the knee.[13]

Dr. Prohaska reviewed the MRI of claimant's knees. In a report dated January 12, 2015, Dr. Prohaska wrote:

> Based on [claimant's] MRI from 12-18-14 of his bilateral knees, I believe once again that his symptoms of anterior knee pain can be related to his motor vehicle accident. The right demonstrates a chondral area that likely is from his direct trauma, and there is also reported a loose body in the knee. From these results, as per the IME, it may be reasonable to document pain relief from an injection, or

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[11] Prohaska Depo., Ex. 2 at 6.

[12] Prohaska Depo. at 37.

[13] P.H. Trans. (Feb. 19, 2015), Cl. Ex. 1 at 3.

> consider diagnostic arthroscopy, starting with his more symptomatic right knee, if it continues this way on his next exam.[14]

Claimant testified he continues to have pain in his bilateral knees when using stairs or walking for prolonged periods, and he cannot kneel on hard surfaces without pain in his kneecap area. Claimant continues to work for respondent. He stated his condition makes his work more difficult, but he is able to perform his job.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b states, in part:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
>
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-508(d) states:

> "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

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[14] *Id*. at 1.

K.S.A. 2012 Supp. 44-508(g) states:

> "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[16]

ANALYSIS

The ALJ found the March 8, 2013, accident to be the prevailing factor for claimant's injuries, including both knees, and need for medical treatment. The undersigned agrees.

Respondent argues, in part, the knee injuries are not related to the accident due to the lack of documentation in the medical records. Dr. Lairmore recorded no complaints of knee pain during his course of treatment, although claimant testified he told Dr. Lairmore about his knee pain. There were also no documented knee complaints in the Stormont-Vail records.

Dr. Brown was the first to record right knee complaints in his November 5, 2013, report, eight months after the work-related accident. Dr. Brown suspected internal derangement in claimant's right knee based upon the severity of the accident, and opined the accident was the prevailing factor for the right knee injury.

Dr. Estivo opined the prevailing factor for claimant's bilateral knee symptoms was age-related degenerative joint disease and not the accident. Dr. Estivo did not have the benefit of reviewing the MRI reports.

Dr. Fevurly thought the knee pain was probably not related to claimant's motor vehicle accident. Dr. Fevurly also did not have the benefit of reviewing the MRI reports.

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[15] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[16] K.S.A. 2013 Supp. 44-555c(j).

In his report of September 11, 2014, Dr. Prohaska wrote the work-related accident was the prevailing factor for claimant's knee condition. After reviewing MRIs taken after his initial examination, Dr. Prohaska affirmed his opinion that claimant's knee condition was related to the accident.

Dr. Prohaska's prevailing factor opinion comes down to claimant's credibility. If one believes claimant told Dr. Lairmore about his knee complaints throughout the course of treatment, the accident was the prevailing factor according to Dr. Prohaska. If one believes claimant had no complaints of knee pain whatsoever until he saw Dr. Brown, the accident was not the prevailing factor for causing claimant's knee condition.

The ALJ, while he did not so state in his Order, impliedly found claimant to be credible. Based upon a review of claimant's hearing and deposition testimony, the undersigned also finds the claimant to be credible. The pictures of claimant's vehicle lead the undersigned to conclude the accident impacted not just claimant's left leg and right foot, but his knees as well. The MRI showed an obliquely oriented tear of the medial meniscus on the left and an obliquely oriented tear of the posterior horn of the medial meniscus on the right. Dr. Prohaska testified prepatellar bursa, which affects claimant's right knee, occurs only with trauma. Dr. Prohaska testified claimant's other knee conditions, hypertrophy of the fat pad and chondromalacia of the patella, could be caused either by trauma or general wear and tear.

Considering these factors, the undersigned finds the work-related accident of March 8, 2013, to be the prevailing factor causing claimant's bilateral knee injuries and need for medical treatment.

CONCLUSION

Claimant has met the burden of proving that his March 8, 2013, work-related accident is the prevailing factor causing injury and a need for medical treatment to both knees.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated February 20, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2015.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge